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THE LAY TRADITION AS TO THE LAWYER

WE all know the lay tradition as to the lawyer. Mike Monaghan rhymes lawyer with trier. He tells us that the Probate Court is instituted to see that "iviry mimber of the bair gits a fair chanct at phwat the dicaysed didn't take wid 'im." In the timeworn anecdote of the epitaph "here lies an honest lawyer" everyone is ready to say, "that's Strange."[1] Laymen, who, sitting as arbitrators, will insist on technicalities which the law would instantly reject, and in corner-grocery discussions will argue that a contract signed with a lead pencil is void for informality, are quite sure that the lawyer systematically rejects the merits of a controversy in order to dispose of it upon some quirk or quibble. The legal muckraker who writes for our periodicals finds no difficulty in obtaining an audience for the most absurd misstatements as to the laws under which we live, and the learned economists and professors of government who, with no knowledge of the law, assume that they may read the dicta in the reports and pronounce judgment upon our legal system upon the basis thus afforded, obtain ready credence from a public disposed by tradition to believe that nothing can be too absurd, too mechanical, too out of accord with everyday life to be the law of the land.[2]

Any tradition so widespread and persistent as this one cannot be without some foundation. As I shall suggest in a moment, there is a certain foundation in the nature of things for popular distrust and popular misunderstanding of the lawyer. But the chief basis of the lay tradition as to the lawyer is historical. It had its origin

* Address before the Rhode Island Bar Ass'n, Providence, December 1, 1913.

[1] Compare the fourteenth-century lines as to St. Ives:

Sanctus Ivo erat Breto
Advocatus et non latro
Res miranda populo.

[2] Sir Frederick Pollock has remarked this. Judicial Records, 29 Law Quarterly Rev. 206, 215.

in jealousy on the part of another great profession and it has been revived and given a new life in recent times by the jealousy of rising professions which feel that the share in public affairs and the place in the public eye which should be theirs is usurped by the lawyer.

Let us look first at the circumstances which may be conceded to afford some basis for lay misunderstanding of the legal profession. Two are of general application wherever justice is administered according to law. Two are peculiar to our legal system and to its American environment.

Of the former perhaps the more important is the necessarily mechanical operation of rules, the circumstance that law acts in gross, with rules made for the average case, and hence often ignores elements in particular situations which seem controlling to the lay mind, focused upon the one case exclusively. The more certainty and stability are insisted upon, the more the law seeks to preclude all personal elements in the administration of justice, the more it will seem to the layman, looking at single causes, that the law is arbitrary and technical and that it defeats the justice it is set up to maintain.[3] But some periods insist strongly upon certainty and stability in the law, and in the reaction from such periods the lay tradition always thrives. Thus the period of the strict law, represented in our legal system by the stage of the common law, from the thirteenth to the sixteenth centuries, insisted upon rule and form as means of achieving certainty and uniformity in judicial decision and so as means of precluding arbitrary magisterial action.[4] In the reaction from the strict law, which is marked by the rise of the court of chancery and the development of equity, the tradition that a good lawyer was a bad Christian, started by clerical jealousy of the lawyer in the middle ages, found willing ears. Again, the nineteenth century, a period of maturity of law, insisted upon detailed rule as a means of securing the social interests in security of acquisitions and security of transactions. Where the seventeenth century insisted upon identifying law and morals, the nineteenth century, thinking of its economic structure resting on property and contract, insisted on differentiating them and on strictly defining their respective provinces. Hence in the reaction which has set in throughout the world, the reaction which European observers are calling the socialization of law, the tradition begun in the twelfth century and handed

[3] For a more extended discussion, see my paper, The Causes of Dissatisfaction with the Administration of Justice, 29 Rep. Am. Bar Assn. 395, 397.

[4] See my paper, The End of Law as Developed in Legal Rules and Doctrines, 27 Harvard Law Rev. 195, 204.

down by the seventeenth century is furbished up and given a new dress and once more becomes popular.

Only less important in keeping alive a lay conception of law as a mass of arbitrary technicalities, used, if not devised, to defeat justice, is the necessary difference between law and public opinion with respect to their respective rates of growth. In a sense SPENCER was well warranted in calling law a government of the living by the dead. We must pay a price for certainty and uniformity in judicial administration. If we refer the judge to the formulated moral sentiments of the community expressed in laws, forbidding him to apply his personal ethical views where such formulations are at hand, we must recognize that only a fixed and settled public opinion may be formulated effectively, and that when it is so formulated, there can be no change until a change of public opinion has become complete and a new fixity has been attained. While moral or intellectual or economic changes are in progress, but before they are so complete as to have formulated new legal standards, an advanced confident and clamorous minority may easily berate the backwardness of the general public in reality, while in appearance berating the obstinate conservatism and inveterate technicality of the lawyer.[5] In periods of rapid growth such as the seventeenth century and the present time, this backwardness inherent in a system of rules is felt acutely by the best minds in the community and the timeworn tradition as to the lawyer gains ready acceptance.

Of the circumstances peculiar to our legal system, one need not hesitate to put political jealousy, excited by our Anglo-American doctrine of the supremacy of law, in the first place. Where this doctrine obtains, the law, and hence the lawyer, has a certain control over magisterial and executive action. With us, indeed, there is even a measure of control over legislative action. This makes the lawyer too conspicuous in public affairs and excites envy. Moreover it brings him into conflict with the aggressive element which in periods of transition demands change for its own sake. In the contest between courts and crown in the seventeenth century, the progressive courtiers who sought to give the king, as guardian of social interests, arbitrary power, so that he might use it benevolently in the interest of the realm, thought of the monarch and so of the state as hampered by pedantic theories of lawyers drawn from such musty and dusty parchments as MAGNA CHARTA.[6] In the contest

[5] I have discussed this more fully in a paper entitled Justice According to Law, 15 Columbia Law Rev. 103, 115, 119-120.

[6] See for example Bacon's Argument in a Case de Rege Inconsulto, Collectanea Juridica, I, 168, 173.

today between the common law and arbitrary pluralities or militant minorities, the progressive courtiers who have the ear of King Demos and seek to give him arbitrary powers, that pluralities and classes who govern in his name may use them benevolently in the interest of society, think of the will of the people as hampered by judicial usurpations based on dead precedents,[7] eighteenth-century bills of rights[8] and anti-social quibbles of lawyers. It is one of the chiefest of the advantages of law that, if only by compelling deliberation before change may be made, it ensures that the more important ultimate social interests shall not be sacrificed to the less valuable but more immediate interests of individuals or of classes. This is the justification of American constitutional law. But the resulting government of laws and not of men seems to be a government of lawyers and not of the people, and thus political jealousy is easily fomented.

In the United States the cult of incompetence, which seems to be an unhappy by-product of democracy, the distrust of special competency in special fields and the complacent royal delusion of Demos that the administration of justice is an easy task to which any man is competent, must also be reckoned with. The lay mode of judging an act is very simple. The layman takes what he calls a broad view. For him particular modes of conduct have certain traditional labels. If, from what appears on the surface, certain characteristics are present which call for one of these traditional labels, a moral judgment is formed at once.[9] The judge on the other hand cannot take this so-called broad view of the case. He is compelled to probe deeper, to listen to and test the relevance of all manner of circumstances of which the layman has taken no account, and the task of decision that has proved easy to the layman he may find very difficult. If his judgment varies from that of the layman, as special competence goes for nought, the reason can only be that lawyers have befogged and beclouded the issue and that the case has gone off on mere legalism.

But this American cult of incompetence has a worse phase in its relation to the attitude of the community toward the lawyer. A people who expect much from the bar have resolutely opposed all attempt to insure a bar adequate to bring about the results which they demand. The bar is expected to maintain the very highest and most disinterested standard of professional ethics. It is expected to maintain an efficiency beyond what is demanded in any

[7] "The way of social progress is barred by barricades of dead precedents." Professor Henderson in 11 American Journal of Sociology, 847.

[8] Johnstone, An Eighteenth-Century Constitution, 7 Illinois Law Rev. 265 .

[9] Westermarck, Origin and Development of the Moral Ideas, 1, 9.

other field of governmental activity. Yet in the first half of the nineteenth century the professional organization and professional tradition, which made a high standard of professional conduct possible and ensures such a standard in England today, were ruthlessly broken down in the interest of a false ideal of democracy that looks upon a distinction between the trained and the untrained as a class distinction.[10] The same false democracy long stood in the way of an educated profession and yields grudgingly today before the demands of the time for a proper training of those who are to administer justice. A purely theoretical democracy was the avowed basis of the change in the tenure of judicial office that swept over the country about 1850, whereby the bench was so generally put into politics and the chances of competent men in judicial office were minimised in so many of our jurisdictions.[11] In view of this if the

[10] Some account of the state of the public mind at that time with respect to lawyers as a profession may be found in Warren, History of the American Bar, chap. 10.

[11] In the debates in the Pennsylvania Convention in which judges were made elective for terms of years, one of the arguments was that short tenure and election would be in line with other changes in the direction of democratic simplicity. "He would ask whether we had not changed in many things connected with our courts of justice, as in the laying aside of ancient customs and dress and the introduction of simplicity for formality? * * * The learned judge * * * who opened this debate recollected perfectly well when the judges * * * wore wigs and gowns and had the sheriffs to go before them with white wands. * * * There was a very aristocratic air about it. * * * Had not judges and counsellors * * * laid aside their wigs and gowns? * * * And is not justice as stern, inflexible and imposing as it used to be? * * * Then why * * * could not and should not something else [i. e. appointment and life tenure] equally unnecessary and useless be also dispensed with?" Proceedings and Debates of the Pennsylvania Constitutional Convention (1837), V, 46. Another was that life tenure by appointment was un-American. "But this tenure is defended by some gentlemen on the ground, not that it is American and conformable to the institutions of a republic, but because it is the British tenure. * * * There was in his opinion no foundation for the assertion * * * that liberty prevailed where the tenure of good behavior was reserved to the judiciary. He denied that the people of England could with propriety be designated as free and independent any more than those of Turkey." Ibid. 123. In the debates in New York in 1846 there are much the same arguments. There are complaints of the mode of organization of the courts under the existing constitution, of the separation of law and equity and with respect to common-law pleading. But the only complaint of consequence as to the judges was that they sometimes directed verdicts. Debates of the New York Constitutional Convention (1846), 719. The change in mode of choice and tenure did not do away with the practice or the necessity of directing verdicts.

A recent writer reviewing the results of the change, in which the Pennsylvania convention of 1837 was a pioneer, says: "We may suspect that, however loudly the political leaders who advocated the change may have declaimed against the dangers of caste prejudice, favoritism and despotic conduct, they were really looking at the offices with envious eyes and plotting to divert the meagre salaries to partisan purposes. This was the period when American political life, in its outward aspects at least, reached its lowest depths of degredation, and that the judiciary should suffer thereby was inevitable. Americans had yet to learn that democracy was not synonymous with vulgarity and provincialism, that the American Revolution had not severed us from the traditions of our race, and that the French Revolution had not emancipated us from the rules of social decorum. The American 'Sans Culotte' was an unlovely type, an iconoclast and a bitter partisan, and that he should have done his best to add the judiciary to the spoils system is not the least count in his indictment." Loyd, Early Courts of Pennsylvania, 149.

lay tradition as to the lawyer has some foundation in twentieth century America, the American people, rather than the nature of the lawyer's calling, must bear the blame.

So much for the circumstances that have served to give currency to the lay tradition and to keep it alive. Now for its origin and history.

In its origin, the traditional attitude toward the lawyer was an incident of the disputes between theology and law which began with the revival of the study of Roman law in the Italian universities in the twelfth century.[12] In part these disputes turned on ethical conceptions and proceeded from clerical objections to litigation, based on texts of scripture. Partly the basis was theological, since theology was challenged by a lay "science of civil rights to be found in the human, heathen Digest."[13] But for the most part clerical jealousy of the rising profession of non-clerical lawyers was the determining element. We must remember that at first the administration of justice and the practice of advising litigants and of advocacy was in the hands of the clergy. Indeed for a time it seemed not unlikely that the universal church courts and church law would carry the day against the local courts and the local law. Naturally the clergy did not relinquish the practice of the law without a protest, and this protest could be made ex cathedra to credulous congregations in the name of religion and of sound morals. Such stories as the one of how the lawyers prayed for a patron saint and, upon the divine concession that the saint whose statue a representative lawyer, duly blindfolded, should select, might be claimed and revered by the profession as their patron, an eminent advocate with bandaged eyes groped about the chamber and as in duty bound embraced the statue of Satan[14]—such stories proceed from this period. Who indeed but Satan could be the patron of a pernicious profession that was taking away from brother Peter and brother Bartholomew one of the chief sources of their revenue?

At the Reformation, theological objections to law and lawyers were about the only thing on which Roman Catholic and reformer were agreed. The part which Roman law had played in the humanist movement and the prominent part taken by the great French jurists of the sixteenth century in the Huguenot party easily led the pious Catholic to the conclusion that the lawyer was an enemy of religion. "The more that one is a great jurist," said one of the

[12] On the subject see Stintzing, Das Sprichwort Juristen böse Christen; Kenny, Bonus Jurista malus Christa, 19 Law Quarterly Rev. 326.

[13] Maitland, Prologue to a History of English Law, 14 Law Quarterly Rev. 13, 32.

[14] The whole story, translated from the French, may be found in 6 Green Bag, 142.

leaders of the party, "so much the more is he a bad Christian."[15] On the other hand, the authority which the lawyers conceded to the canon law, and their universal ideas of law, which smacked suspiciously of Catholicism, aroused the animosity of Protestants.[16] And this animosity was intensified by the distaste which LUTHER, as has happened in the case of other vigorous and impulsive personalities, felt for conventional rule and for attempts to confine the course of justice and to coerce the will. The Christian needed no rules of law. His own conscience, the Scriptures and the guidance of the Holy Spirit would keep him in the right path. Hence LUTHER was never weary of declaiming against lawyers, and the tradition got its currency among the Protestant clergy of the next century through his writings.[17]. Writing and talking in a period of transition, when the reception of Roman law on the Continent required a process of adjustment to the needs of a new world, his bitter epigrams were congenial to a people irritated by a legal situation not without parallel in the present, and gave rise to many popular sayings of similar import. Political jealousy, due to the

[15] Stintzing, p. 12. It is said of Viglius, President of the council at Brussels in the sixteenth century: "fecit tritum pene vulgo proverbium juristam bonum esse Christianum malum." Stintzing, p. 29, note 8.

[16] Melanchthon said: "legum contortores bonorum extortores." Popular sayings of the time were:"juristae, nequistae," "jurisconsultus, ruris tumultus," Stintzing, p. 20.

[17] The following examples will suffice:

"If now all jurists were baked into a cake and all wise men brewed into a drink not only would they let causes and law suits alone but also they would not talk and think about them so much."

"What shall the good judge do? He knows the innocence of the defendant. Shall he condemn him upon the evidence of legal proofs against his knowledge since he knows that in this way wrong will be done him? Now the jurists console him thus: O, Judge, while you know that wrong will be done this man, you know that as a private person and hence for yourself, not in your capacity of judge who must speak **secundum allegata et probata**, according to what is pleaded and proved; therefore that which is not brought before you in orderly legal fashion in the way of proof matters not to you—and upon what is so brought forward you believe you do right."

"For example, if a lawyer is convinced in his mind that he has a losing or a doubtful cause he does not take counsel of the spirit and hold fast to the sound and reject the unsound but he considers only how he can make a bad cause good—and thus it comes about that out of the same text of the law one draws poison so that he shields an unrighteous cause, another draws honey so that he confirms a righteous cause."

"Moreover, jurists and counsellors exert themselves so to guide and expound the law that it will help the cause and distort the words to their own use, overlooking equity and duty to one's neighbor. And whoever in such cause is the most skillful and subtle, him the law helps the best for indeed the laws themselves say **vigilantibus jura subveniunt**."

" 'Now, then,' says such a jurist, (a bad Christian), 'I will do as much as I can, I will take it up and play for delay although I cannot defeat it.' 'Can you do that?' says the client. 'Oh, yes indeed, ten years or even longer, but in the meantime you must pay me ten thaler down.' 'Very well,' says the client, 'if you will do that, here's the cash.' "

Köhler, Luther und die Juristen, § 3 (pp. 50-51).

supplanting of the clergy by the lawyers in the conduct of the state, reinforced this tradition and handed it down. For on the whole, down to the Reformation, the great offices of state had been the perquisites of the clergy. Clergymen had shared the reins of government at most only with soldiers. And in all the growing departments of governmental activity that had to do with the affairs of peace they had been supreme. When they found a new rival in the lawyer and when this rival pushed them out of one after another of the great offices of state, the pious clergymen could perceive clearly the peril to religion and good morals which this change involved. The zeal which coined such phrases as "Juristen bőse Christen, ja diabolisten," "legum contortores, bonorum extortores," "legum doctores sunt legum dolores," "juris periti sunt juris perditi,"[18] was born of professional concern at the supersession of the clergy in the kingdoms of *this* world by the rise of the legal profession, and the natural disinclination of those who had been wont to lay down the law for both worlds to confine their attention to the less immediately profitable and immediately rewarded calling of preparing for the world to come. These phrases, which gained currency in the seventeenth century, express ideas which are the staple of modern denunciations of the lawyer by teachers of economics, politics and government.

In America the foregoing bit of history was repeated in such wise as to give new vitality to the twelfth-century clerical tradition. The Protestant tradition, adverse to lawyers, was strong in Colonial America. CROMWELL had found, as he put it, that the sons of Zeruiah were too hard for him[19] and had retired from a single attempt to impose his ideas upon the English bar. This did not lead to a charitable view of the profession on the part of the roundhead. MILTON wrote of lawyers that they ground "their purposes, not on the prudent and heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees."[20] The pamphlet literature of the Commonwealth teemed with attacks upon the legal profession[21] and the pious Puritan, apart from religious grounds,

[18] Stintzing, p. 20.

[19] "In a conversation with Ludlow, recorded by that historian, Ludlow says that Cromwell stated to him 'that it was his intention to contribute to the utmost of his endeavors to make a thorough reformation of the * * * law: but, said he, the sons of Zeruiah are yet too strong for us; and we cannot mention the reformation of the law but that they presently cry out we design to destroy propriety; whereas the law as it is now constituted serves only to maintain the lawyers, and to encourage the rich to oppress the poor.'" Parkes, History of the Court of Chancery, 165, citing Ludlow's Memoirs, 123. See also James, L. J., in Davey v. Garrett, 38 Law Times n. s. 81.

[20] The whole passage may be seen in Warren, History of the American Bar, 6.

[21] A partial list may be found in Warren, History of the American Bar, 7.

apart from his doctrine of consociation rather than subordination, apart from his belief in the individual conscience as the ultimate measure of conduct, was naturally disposed to regard law as "a dark and knavish business"[22] and to regard lawyers as mischievous parasites upon society. In New England the clergy were supreme throughout the seventeenth century. They conceived, as the non-lawyer usually does, that administration of justice was an easy matter, requiring no special skill, training or experience, and hence they were confident that all that was needed for just and righteous government of human relations might be found in their own consciences and in the word of God. Where today the question is one of law—does a proposed measure accord with the constitution, which is the supreme law of the land—then the question was one of theology, does the measure accord with the word of God?[23] In Pennsylvania, the Quakers were opposed to all contention, to all litigation, and hence to any system of tribunals at all. The middle of the eighteenth century saw the rise of a legal profession. The last quarter of the century saw the firm establishment of a system of courts, and by the beginning of the nineteenth century executive justice and legislative justice, which had prevailed in the colonial period, were definitely superseded by judicial justice. Then followed the reception of the common law of England and the working over of the old English case law and the old English statutes into a common law of America which marks the period ending with the Civil War. The sceptre of justice had passed once more from the clergyman to the lawyer.

The reasons for this change are clear enough. Increasing complexity demands increasing specialization. A crude system of magisterial justice which will suffice for a pioneer community will not suffice for the commercial and industrial community of succeeding generations. With the development of society a scientific system of law was inevitable, and as in the case of any other science, this involved specialized training and a class of professional exponents. As the need for law grew, as the growing importance of the social interests in security of acquisitions and security of transactions called for more certainty and hence for greater detail of legal rule, the importance of the lawyer grew also. And our political system, with its elaborate legal machinery of checks and balances, demanded

[22] Professor J. B. Thayer, Record of the Commemoration of the Two Hundred and Fiftieth Anniversary of Harvard College, 321.

[23] "The Govnr, Deputy Govnr, Theo. Dudley, John Haynes, Rich. Bellingham, Esq., Mr. Colton, Mr. Peters and Mr. Shepheard are intreated to make a draught of lawes agreeable to the word of God, wch may be the fundamentalls of this Commonwealth and to present the same to the nexte Gen'all Court." Resolve of the General Court of Massachusetts Bay, 25 May, 1636. Mass. Colon. Rec. I, 174.

legal knowledge and invited legal interference in connection with almost every act of governmental activity. Hence, as Colonial America was the period of the clergyman, nineteenth-century America was the period of the lawyer. It was not merely that the administration of justice had passed into his hands. In nineteenth-century politics the sole rival of the lawyer was the soldier. From DE TOCQUEVILLE to BRYCE, observers were agreed as to the leadership of the lawyer in American communities.

It could not be expected that this passing of the hegemony from the pulpit to the bar would be acceptable to the learned and eloquent profession which had been displaced. Nor did the circumstance that the causes of this supersession were economic, or in other words, material, make it more acceptable. With their books full of the echoes of LUTHER'S diatribes, it was but natural that the clergy should view the rise of law and consequent rise of the lawyer as a triumph of the material over the spiritual, a sacrifice of justice and right to the greed and craft of a parasitic class. Sermons of the first half of the nineteenth century are full of this, and nothing but the inexorable operation of economic conditions that demanded law enabled lawyers to overcome the violent hostility to their profession that prevailed almost to the time of the Civil War.[24]

After the Civil War the lawyer's position seemed secure. The old tradition still lingered in stale jokes and conventional stories, but it had lost its vitality. But new rivals were arising to contest the leadership of the bar, and at the close of the last century new jealousies were beginning to give a new currency to the medieval clerical view of the legal profession. To say nothing of medicine, which has almost had a rebirth in our own day, engineering and journalism and, recently, the teaching of economics and government in colleges, have come forward to contest for the leadership. The physician sees that the government maintains an attorney general and a department of justice, but not a surgeon general and a department of health. The engineer sees the high offices of state filled with lawyers while there is no chief engineership of any of our commonwealths to which he may aspire. The journalist sees the lawyer continually in the public eye. He sees that what the reporter knows to be true and the editor daily proclaims in his columns, the courts persist in trying and determining in their slow and technical fashion. The physician may feel that he alone knows how to deal with insanity, but when he steps into court he is cross-

[24] Political and economic causes made immediately for this hostility to lawyers. The point which concerns us here is that under these circumstances the clerical tradition gained new strength. There is a good account of this period in American legal history in Warren, History of the American Bar, chap. 10.

examined as a mere witness and he finds that the ultimate questions are of law and for lawyers. The engineer may feel that he has some special competency in such matters as railway rate regulation, but he finds that commissions are largely composed of lawyers or guided by lawyers and that their methods tend more and more to become legal. The journalist may feel that he is in the closest touch with public opinion of any of the professions, that he may pronounce most authoritatively as to the popular will. He may think that his views and his pronouncements should have the weight in law which they have in politics; that they should have the weight in judicial administration which they have in executive administration. That they have not, he sees, is due to the training and the mental habits of the bar. The teacher of economics and of government sees his teachings remain teachings only, except as in the slow process of law-building they may come into their own a generation hence. Thus the great professions of today find the lawyer, as it were, intrenched in state house and senate house. It is easy for them to persuade themselves that this must be wrong. Confident that they too have the power to do great things for society, if but the conduct of affairs is put in their hands, they think of the lawyer as barring the way to social progress for selfish ends.

Unless one perceives that a struggle of professions for leadership is involved, it is hard to understand the bitterness which learned scientists display in writing of the legal profession. Most of these learned men are quite innocent of any notion of why the law exists, of how it has come to be or of the economic and social forces that have put the lawyer where he is. What they do know is that they encounter him everywhere and that he holds a position of vantage. Their minds are a fertile soil for the timeworn tradition and they are quite ready to outdo even LUTHER. Let one example suffice. An eminent alienist, in answering a questionnaire sent out by the New York State Bar Association, in preparation for reform of the doctrines of the criminal law with respect to insanity, thought it proper to give this answer:

"The real abuse is the legal abuse of furthering class interests, i. e. legal ones, at the expense of sick people and under the guise of protecting the community. The hypocrisy of the legal method of dealing with the medical problem of mental disease, is to my mind one of the worst abuses that must be remedied in the near future."[25]

[25] Jelliffe, The New York Bar Association Questionnaire—Some Comments, 4 Journal Am. Inst. of Criminal Law and Criminology, 368, 375.

In like manner jealousy on the part of civilian colonial administrators, who find themselves superseded in their judicial functions by trained lawyers, has produced a book recently which even goes beyond the bitter sayings of the clergy of the Reformation. Durran, The Lawyer, Our Old Man of the Sea (1913).

It may be that the learned doctor really believes that the law as to insanity was deliberately devised and is deliberately maintained in order to fill the pockets of lawyers. If so, such belief argues a most unscientific mode of thought on the part of a scientific profession. It is significant of the mental habits of a profession that is compelled to think accurately and reason closely that no lawyer of eminence has soberly discussed the forensic doings of other professions in such vein. And yet every trial lawyer knows that physician and surgeon and alienist and neurologist, when their aid is sought in the administration of justice, do not exactly serve God for naught. The real point is, doubtless, that the lay expert is angered by the thought that he must expound his expert knowledge to the non-expert and must argue it with the lawyer. To those who are wont to speak ex cathedra, without the constant check of a keen-witted opponent, contradiction or even question seems akin to insult.

In its origin and in its continuance, then, the tradition of which I have been speaking is but a tribute to the position of the lawyer in the community. Nor is it likely permanently to impair that position. No reforms and no social programs that are likely to be achieved in such time as we may foresee will make it possible to do away with regulation of human conduct in a finite world where all the demands of every individual may not be satisfied. Nor is it likely that magistrates can ever be found to whom the royal power of administering justice without law may be safely entrusted. Our ambitious schemes of social reform call, not for less law, but for more law. The call of the time is not for less training and less specialization on the part of those who have to do with the administration of justice, but for more. In our larger states, even the experienced prosecutor cannot know the whole of the penal code he enforces, so overgrown has it become. Moreover, whatever other ends develop, the administration of justice will remain the chiefest end of government, and law will remain the chief agency by which it achieves its end. Hence, from the necessity of the case, those who expound, interpret and apply the law will always be men of mark, will always be, if not in name, yet certainly in substance, the leaders of the state—and for these very reasons will incur the jealousy of rival professions. When the tradition invented by twelfth-century priests and monks is forgotten, it will mean that anarchy or the millennium has obviated the social need for law and government.

ROSCOE POUND.

HARVARD LAW SCHOOL.